

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-2130

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To be argued by:
STEVEN W. FISHER

United States Court of Appeals For the Second Circuit

ROBERT BROWN,
Petitioner-Appellant,

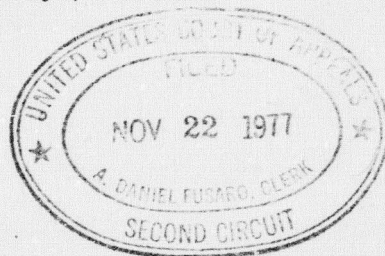
-against-

MELVYN TANENBAUM, a Judge of the County Court of the
State of New York, Suffolk County, HENRY O'BRIEN,
District Attorney of Suffolk County, BENJAMIN WARD,
Commissioner of Corrections of the State of New York, and the
SHERIFF OF THE COUNTY OF SUFFOLK,
Respondents-Appellees.

BRIEF FOR PETITIONER-APPELLANT

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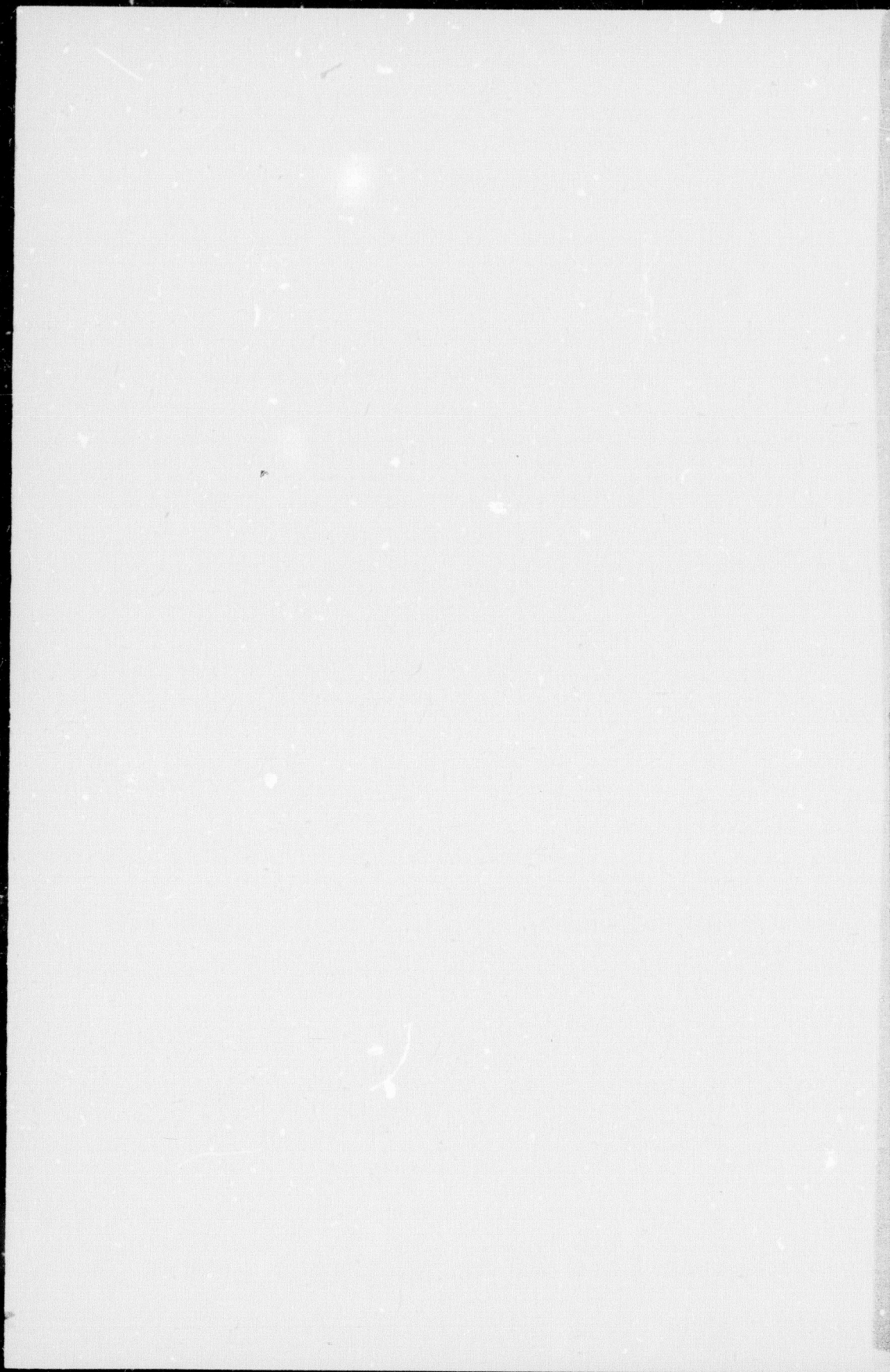


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**UNITED STATES COURT OF APPEALS
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Docket No. 77-2130

ROBERT BROWN,

Petitioner-Appellant.

-against-

**MELVYN TANENBAUM, a Judge of the County Court of
the State of New York, Suffolk County, HENRY
O'BRIEN, District Attorney of Suffolk County,
BENJAMIN WARD, Commissioner of Corrections of the
State of New York, and the SHERIFF OF THE COUNTY
OF SUFFOLK,**

Respondents-Appellees.

BRIEF FOR PETITIONER-APPELLANT

Preliminary Statement

The petitioner, ROBERT BROWN, appeals from a memorandum decision and order of the United States District Court for the Eastern District of New York (Pratt, J.), dated October 19, 1977, dismissing his petition and denying his request for federal habeas corpus relief from a judgment entered April 2, 1976, in the County Court of the State of New York, Suffolk County, which, upon his plea of guilty, convicted him of the crimes of obscenity in the first and second degrees, and sentenced him to serve concurrent terms of imprisonment of three years and of sixty days respectively (Tanenbaum, J., at plea and sentence).

On November 1, 1977, with the consent of the District

Attorney, this Court ordered that the execution of judgment be stayed pending the determination of this appeal. Consequently, the petitioner is presently at liberty on his own recognizance.

QUESTIONS PRESENTED

1. Under the law of New York and by reason of the unambiguous language of the County Court, is the obscenity *vel non* of the magazines upon which the petitioner's conviction is based preserved for federal collateral review?

2. May a magazine which serves as an instructive manual describing textually and with photographs techniques used in widely indulged in sexual practices, particularly cunnilingus, be held to be utterly without redeeming social value?

3. May a magazine which provides for the homosexual community textual and pictorial descriptions of the techniques of fellatio and commentary upon various studies of homosexuality with a related bibliography be held to be utterly without redeeming social value?

4. Did the decisions of the Court of Appeals of New York, rendered prior to the commission of the acts here charged, so construe the State's former obscenity law as to comport with the specificity requirements later announced in *Miller** and afford adequate notice that the matter depicted in the magazines here in issue was proscribed?

**Miller v. California*, 413 U.S. 15 (1973).

STATEMENT OF THE CASE

A. Introduction

Robert Brown faces three years imprisonment upon a conviction obtained under a now abandoned penal statute which so hopelessly failed to define with specificity the conduct it proscribed that four Justices of the Supreme Court of the United States and three Judges of the Court of Appeals of New York were of the view that not even exhaustive judicial construction could rescue the provision from its inherent constitutional deficiencies.*

The petitioner's conviction is founded upon his sale of two magazines. When he made the sale, he believed, and was so advised by counsel, that the magazines were not obscene under the then controlling *Roth-Memoirs* criteria.* * (See Petition ¶¶ 16-17). He continues to believe that today.

In this proceeding, the petitioner sought access to the federal courts for a review of the obscenity *vel non* of the magazines in an adversarial context; no adversarial proceeding on the issue had been permitted in the County Court. Federal review was denied him, however, when the District Court ruled that the constitutional issue of obscenity *vel non* had not survived the petitioner's guilty plea.

*See *Buckley v. New York*, 418 U.S. 944, 944-946 (1974) (Brennan J. dissenting) and *People v. Heller*, 33 N.Y.2d 314, 334-343, 307 N.E. 2d 805, 352 N.Y.S.2d 601 (1973) (dissenting opinions of Jones and Wachtler, J.J.).

***Roth v. United States*, 354 U.S. 476 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

The petitioner strenuously maintained below that, in a manner consistent with the law of New York, the unambiguous language of a pre-trial order of the court of conviction had reserved the obscenity issue for direct appeal and, hence, for habeas corpus review. The District Court rejected that contention, choosing instead to give to the language of the order an interpretation only belatedly suggested by the District Attorney in a letter to the court. Further, the District Court claimed to find support for its interpretation in the affirmance without opinion by the Appellate Division and in the denial of leave to appeal to the Court of Appeals by Chief Judge Breitel.

On this appeal the petitioner will argue that the District Court erred in its interpretation of the order of the County Court by giving it a meaning which was not intended by its author and which is at odds with its plain language, especially when read in the context of the statutory law of New York. Moreover, the petitioner will contend that since neither the action of the Appellate Division nor the order of Chief Judge Breitel has any relevance to the question at bar, the District Court's reliance thereon was error.

The petitioner will therefore ask this Court to hold that federal habeas corpus relief on the issue of obscenity is available to him. He will further request that the Court review the magazines and declare them not obscene as a matter of law, or remit the case to the District Court with directions to reach the merits of petitioner's claim. In the alternative, should the Court be unwilling to rule on this record that the obscenity issue has been preserved, the petitioner will request that the case be remitted to the District Court for an inquiry into the understanding with which the plea was entered.

As a separate contention below, the petitioner argued that the statute under which he was convicted, both on its

face and as construed prior to the acts charged, did not comport with the specificity requirements later announced in *Miller* and failed to afford adequate advance notice that the matter depicted in the magazines was proscribed. The District Court rejected that contention, relying on the view of the New York Court of Appeals in *People v. Heller*, 33 N.Y. 2d 314, 307 N.E.2d 805, 352 N.Y.S. 2d 601 (1973), *cert. denied sub nom Buckley v. New York*, 418 U.S. 944 (1974), that, in a long line of pre-*Miller* cases, that court had never construed the statute with less specificity than *Miller* required. On this point, the petitioner will argue that the District Court was wrong because the *Heller* decision was wrong. He will ask this Court to look behind the *Heller* opinion, to examine the precedents upon which it relied, and to conclude, as the petitioner has, that the statute had in fact never been construed with the specificity that *Miller* demands. Further, the petitioner will argue that, contrary to the finding of the District Court, the lack of specificity in the statute as written and construed deprived him of adequate advance notice that the matter depicted in the magazines he sold was proscribed.*

B. Factual Background of the Case

On March 22, 1972, Judge Frank L. Gates of the County Court, Suffolk County, issued a search warrant authorizing the seizure of certain magazines which he had personally

*The District Attorney below did not contest the assertion that the issue of the constitutionality of the statute had survived the plea of guilty and was properly raised in this habeas corpus proceeding. The District Court reached the merits of the claim, and so it seems agreed that the question is properly before this Court on appeal. See, e.g., *Gesicki v. Oswald*, 336 F. Supp. 371, 374 n.3 (S.D.N.Y. 1971) (per Irving R. Kaufman, C.J.), *aff'd* 406 U.S. 913.

examined *ex parte* and which he had determined to be obscene (see, A15.)* As it happened, this was to be the only judicial scrutiny ever given these magazines prior to the petitioner's conviction for their sale.

On April 28, 1972, a Suffolk County grand jury returned an indictment, based upon those magazines, charging the petitioner and others, in 207 counts, with the crimes of conspiracy in the third and fourth degrees and obscenity in the first and second degrees, allegedly committed between January 1971 and April 1972. (A 9-10.)

When proceedings began, the petitioner interposed numerous pre-trial motions, including one to controvert and suppress, and many requesting discovery. Each motion was strenuously opposed by the District Attorney; each was summarily denied. (A 11.)

Among the motions made were three of particular significance to the issues at bar. The first was an omnibus motion seeking, *inter alia*, judicial inspection of the grand jury minutes and the dismissal of the indictment on the ground that the evidence adduced was not legally sufficient to sustain it. The motion was summarily denied, with the County Court (per Pierre G. Lundberg, J.) noting,

"The titles included in this multi-count indictment are the same titles included in the search warrant issued by this Court on March 22, 1972 (Hon. F. L. Gates). After scrutinizing each of said publications, Judge Gates made a preliminary determination that each of said publications is obscene before issuing the warrant This resolves in my mind the question — whether the

*Numbers cited in parentheses preceded by the letter "A" refer to pages in the Joint Appendix submitted herewith.

titles included counts 2-207, inclusive, are obscene pursuant to Penal Law §235.00. (A15.)

The second motion sought dismissal of the indictment, *inter alia*, on the ground that "[t]he material [was] not obscene as a matter of law." Once again, the County Court (per Lundberg, J.) denied the motion summarily. (A 16-18.)

The third motion sought reargument of the previously denied motion to inspect and dismiss. In his supporting affirmation, counsel made reference to the then newly decided case of *Matter of Miranda v. Isseks** and argued,

In the instant case, it is the contention of the defendants that the indictment is invalid since it was founded on legally insufficient evidence. Since the law clearly states that the denial of a motion to inspect the Grand Jury Minutes and for dismissal of the indictment is not reviewable on appeal no matter how legally deficient the proof before the Grand Jury, if the prosecutor on the trial has established his case, it is incumbent on the court to inspect the Grand Jury minutes, at least in camera, so as to afford the defendants their constitutional rights. (A21.)

Once again, the petitioner's motion was summarily denied.** In its memorandum decision, however, the

* 41 App. Div. 2d 176, 341 N.Y.S. 2d 541 (2nd Dept. 1973).

** A little more than a month after this summary denial, the Supreme Court decided that it would take more than an *in camera* inspection "to afford . . . defendants their constitutional rights". It was held that, in order to safeguard the First Amendment rights of an accused in the petitioner's position, there must be made available to him a prompt pre-trial adversarial proceeding to test the obscenity *vel non* of the materials seized. *Heller v. New York*, 413 U.S. 483 (1973) (decided June 25, 1973). No such proceeding was ever allowed to the petitioner in the County Court.

County Court (per Lundberg, J.) directly addressed the petitioner's fears of non-reviewability. The court wrote:

Neither the Criminal Procedure Law nor *Matter of Miranda v. Isseks*, 41 App. Div. 2d 176, prevent [sic] the defendants from entering pleas of guilty and thereafter appealing this Court's prior determination based on the language of the C.P.L. and the prior judicial determination by Judge Gates. (A22.) (Emphasis in original.)

Thereafter, following consultation with counsel regarding the course and effect of the proceedings previously had, and mindful of the interests and fate of his son, the co-defendant Barry Brown, the petitioner entered pleas of guilty to two counts — one charging a felony, the other a misdemeanor — in full satisfaction of the indictment. (Petition ¶15.) No promise was made to him regarding the length of his sentence.

On April 2, 1976, judgment was pronounced. The petitioner was sentenced to serve a term of imprisonment of three years on the felony conviction and a concurrent term of sixty days on the misdemeanor. The petitioner thereupon appealed to the Appellate Division of the Supreme Court of New York, Second Judicial Department, which unanimously affirmed the judgment without opinion. (A 9.)* Leave to appeal to the Court of Appeals of New York was thereafter denied by Chief Judge Breitel (Petition ¶19).

* In his brief to the Appellate Division, the petitioner argued as a separate point that "[t]he trial court erred in refusing to declare the publications which were the subject of the indictment not obscene as a matter of law and thereupon, to dismiss the indictment..." Petitioner's Brief at the Appellate Division, Point 4.

Subsequently, the petitioner sought federal habeas corpus relief from the judgment of conviction. As heretofore noted, the District Court (Pratt, J.) in a ten page decision, denied the requested relief and dismissed the petition, holding that the issue of the obscenity *vel non* of the magazines had not survived the petitioner's guilty plea and that, as applied to the petitioner, the statute under which he was convicted was constitutional. (A 36-45.)* It is this decision and order from which the petitioner now appeals.

A R G U M E N T

POINT I

BY EXPRESS RESERVATION OF THE COURT OF CONVICTION, AND BY OPERATION OF LAW, THE ISSUE OF THE OBSCENITY VEL NON OF THE MAGAZINES HEREIN SURVIVED THE PETITIONER'S PLEA OF GUILTY AND IS PROPERLY PRESENTED FOR THIS COURT'S REVIEW

The petitioner recognizes that a criminal defendant whose conviction results from his plea of guilty is ordinarily deemed to have waived all antecedent non-jurisdictional defects in his prosecution. A collateral attack upon such a conviction is generally limited to an inquiry into the voluntariness of the plea and the adequacy of the advice provided by counsel. *Tollett v. Henderson*, 411 U.S. 258 (1973); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970). The reason that a guilty plea is given such far-reaching effect is that it is viewed as:

*Judge Pratt *sua sponte* issued a Certificate of Probable Cause. (A45.)

... an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.

Menna v. New York, 423 U.S. 61, 62 n. 2 (1975).

Obscenity cases, however, do not readily fit into this scheme, for "factual guilt" rarely plays any significant part in their ultimate resolution. Issues respecting whether the accused did, as charged, promote, exhibit or mail certain material, and whether he did so with requisite scienter, can and do sometimes arise, and may be deemed questions involving "factual guilt." More often than not, however, such cases turn entirely upon whether the material itself is obscene, or is instead protected by the First Amendment. Some courts have termed obscenity a mixed question of law and fact. See, e.g., *People v. Richmond County News*, 9 N.Y. 2d 578, 581, 175 N.E. 2d 681, 216 N.Y.S. 2d 369 (1961). This Court has said that,

... obscenity *vel non* is not an issue of fact with respect to which the jury's finding has its usual conclusive effect. It is rather an issue of constitutional law that must eventually be decided by the court.

United States v. A Motion Picture Film Entitled "I Am Curious-Yellow", 404 F.2d 196, 199 (2nd Cir. 1968).

See, also, *Jenkins v. Georgia*, 418 U.S. 153 (1974).

In any event, "the valid establishment of . . . guilt" in such cases is inextricably linked to the proper determination of the constitutional question of the obscenity *vel non* of the materials. A constitutional violation or error with respect to the latter is indeed "logically inconsistent with the valid establishment of . . . guilt" and hence a guilty plea in an obscenity case does not render such constitutional error "irrelevant." *Menna v. New York, supra*.

With this as a backdrop, we turn to the case at bar. Here, of course, no true issue of "factual guilt" was presented. The petitioner did not deny that he had sold the magazines or that he knew their content. His sole contention was that the magazines were not obscene under the then controlling *Roth-Memoirs* test, if for no other reason than that they were not utterly without redeeming social value. Although the Supreme Court would soon hold that the Constitution requires a prompt adversarial pre-trial hearing on the issue of the obscenity *vel non* of seized materials (*Heller v. New York, supra*), all of the petitioner's efforts to obtain any sort of determination on the issue were to no avail.* Indeed, not only were petitioner's motions to dismiss summarily denied, but he could not even persuade any judge before whom he appeared to look at the magazines.

*It is of some interest that, in *Heller*, the Supreme Court noted with apparent satisfaction that "[t]he State of New York has represented that it stands ready to grant 'immediate' adversary hearings on pre-trial motions challenging seizures of material arguably protected by the First Amendment." 413 U.S. at 490 f/n. Evidently this readiness was not shared by the State's agents in Suffolk County.

His motion to inspect was summarily dismissed when the court, in direct contravention of the procedure later required in *Heller, supra*, adopted the *ex parte* finding of another judge without making any independent evaluation of its own. The same court summarily denied another motion which sought dismissal of the indictment on the ground that the materials were not obscene as a matter of law. In denying that motion, the court held interestingly enough that "a sixty-three page 'Schedule of Cases Holding Various Materials Not to be Obscene in a Constitutional Sense' [which was annexed to the petitioner's papers, failed] to demonstrate any basis for this Court to entertain this motion as a matter of discretion." (A18.) Hence, again the court refused to make any independent examination of the materials underlving the massive 207 count indictment.

Finally, in once again summarily denying a defense motion—this one to reargue the previously denied motion to inspect and dismiss—the court sought to put to rest petitioner's concern that the sufficiency of the grand jury evidence would be beyond appellate review. The court wrote:

Neither the Criminal Procedure Law nor Matter of *Miranda v. Isseks*, 41 App. Div. 2d 176, prevent [sic] the defendants from entering pleas of guilty and thereafter appealing this Court's prior determination based on the language of the C.P.L. and the prior judicial determination by Judge Gates. (A 22.) (Emphasis in original)

In the District Court below, the petitioner argued that this unequivocal statement, to which no exception had been taken or motion to resettle addressed, expressly reserved the right to appeal, and therefore to seek federal collateral review of, the legal sufficiency of the evidence presented to the grand jury and hence, the obscenity *vel non* of the magazines. In view of this

reservation, the petitioner likened his plea to the so-called "conditional pleas" of which this Court and others have expressed approval in cases where issues of law predominate. See, e.g., *United States v. Zudick*, 523 F.2d 848, 851-852 (3rd Cir. 1975); *United States v. Mann*, 451 F.2d 346, 347 (2nd Cir. 1971); *United States v. Doyle*, 348 F.2d 715 (2nd Cir. 1965); *United States v. Consiglio*, 391 F. Supp. 564, 569 (D. Conn. 1975). The petitioner argued that the court's statement had put all parties on notice that the expectation of finality which ordinarily attaches to pleas of guilty would not attach to his plea with respect to the issue reserved, viz., the obscenity *vel non* of the magazines. Cf. *Lefkowitz v. Newsome*, 420 U.S. 283 (1975). The petitioner asserted that he had felt "perfectly entitled to, and legitimately did, rely on the court's interpretation of the law as set forth and memorialized in its written decision." Petitioner's Reply Brief at 7.

The District Attorney denied that the plea had been conditional. He termed Judge Lundberg's order a misstatement of the law and argued that no competently counselled defendant could have entertained a legitimate expectation that the order would be given force and effect. (See, Respondent's Second Memorandum of Law at 9-11.) The petitioner replied, firstly, that the order was not a misstatement of law, and pointed to the fact that the Appellate Division for the Second Department had in the past examined the sufficiency of grand jury evidence on an appeal following a plea of guilty. See, e.g., *People v. Schifter*, 34 App. Div. 2d 561 309 N.Y.S. 2d 656 (2nd Dept. 1970).

Moreover, the order of the County Court simply recognized that the petitioner's right of review was preserved by statute. Section 710.70 subd. 2 of the Criminal Procedure Law provides that the denial of a motion to suppress is preserved for appellate review even where the judgment of conviction is entered upon a plea of guilty. In denying such a motion made by the petitioner in the

County Court. Judge Gates, who had issued the search warrant, stated that he had done so only after having personally examined the magazines *ex parte* and having determined that they were obscene. (See, A 15.) Judge Lundberg's refusal to conduct an independent examination of the magazines and his denial of petitioner's motion addressed to the obscenity *vel non* were based entirely upon Judge Gates' prior judicial determination. Since by statute Judge Gates' determination was appealable even after a plea of guilty, Judge Lundberg was correct in holding that the underlying merit of his own orders relating to obscenity would likewise be reviewable after a plea.

It is of importance to note in the context of this federal habeas corpus appeal that a warrant aimed at allegedly obscene materials presents issues which lie at the crossroads of the First and Fourth Amendments. See, e.g., *People v. Brown*, 46 App. Div. 2d 590, 591, 364 N.Y.S. 2d 512, (1st Dept. 1975) (Kupferman, J. concurring) *aff'd* 40 N.Y. 2d 183, 352 N.E. 2d 545, 385 N.Y.S. 2d 359. If the materials are not obscene, then the warrant must fall and the evidence must be suppressed. Hence, in every motion to controvert and suppress brought in an obscenity case, the obscenity *vel non* of the materials seized is in issue. In New York, therefore, where a motion to suppress is made, the issue of the obscenity *vel non* of the materials survives a guilty plea by statutory command. Federal habeas corpus review of the issue is then available under the holding of *Lefkowitz v. Newsome*, *supra*, and is not foreclosed by *Stone v. Powell* (428 U.S. 465 [1976]) since the pure issue of obscenity *vel non* bears no relationship to the policy considerations underlying the Fourth Amendment's exclusionary rule. Hence, by operation of law, the petitioner is entitled to federal habeas corpus review of the obscenity *vel non* of the magazines. Cf. *Langella v. Commissioner*, 413 F. Supp. 1214 (S.D.N.Y. 1976), *aff'd* 545 F. 2d 818 (2d Cir. 1976).

Additionally, in the District Court, the petitioner argued

that even if Judge Lundberg's decision did constitute a misstatement of law, the petitioner was entitled to rely on it. He rejected the notion that he bore the burden of knowing and understanding the law better than the judge before whom he stood. At this, the District Attorney took what seemed an abrupt turnabout. In his letter to the District Court of June 14, 1977, he now described Judge Lundberg's order as one concerning "a *potential* right to appellate review which, however, failed to ripen into *actuality*." (Emphasis his.)

In effect, the District Court adopted that view, interpreting Judge Lundberg's comment as giving "the correct law . . . that a properly framed guilty plea could be entered which preserved the reviewability of the obscenity *vel non* of the magazine on appeal." (A 40.) In other words, the District Court read the order as simply pointing out the possibility of entering a conditional plea—a possibility which never came to pass.

In support of its conclusion, the District Court wrote:

Neither the trial judge, the judges of the New York Appellate Division nor one judge of the New York Court of Appeals could find such a clear understanding and expectation of a conditional plea; the prosecutor, an alleged party to the agreement, denies its existence; and the record of the plea proceedings is completely barren of any mention of a clear, express, conditional plea which reserved review of the obscenity *vel non* of the magazines for this or any other court. (A42.)

This finding is without merit. The only indication of the trial court's belief as to appealability is the unequivocal assurance given by Judge Lundberg that the issue of obscenity would survive a plea of guilty. The affirmance without opinion by the Appellate Division carries no meaning other than that the court found no reversible

error. Cf. C.P.L. § 470.25(1). The order of the Appellate Division contains no suggestion that the court was of the view that the obscenity *vel non* of the magazines had not been preserved.* The order of Chief Judge Breitl, consistent with the standard practice in this State, gave no reason for the denial of leave to appeal.

It is true that no express mention of reviewability was made at the plea proceeding. However, the printed order reserving the issue had been made in the same court in which the plea was offered. The order was presumably in the file before the judge who accepted the plea. The District Attorney was a party at the proceeding wherein the order was issued; at no time did he take any action to challenge its unambiguous holding.

It may of course be true that the District Attorney did not fully comprehend the meaning and effect of the clear language of Judge Lundberg's order. However, it would be manifestly unjust to deprive the petitioner of collateral review of his First Amendment claim because of the misunderstanding of the District Attorney. After all, it was not the responsibility of the petitioner to explain to the District Attorney the meaning of court orders.

It is therefore respectfully submitted that the District Court erred in holding that the obscenity *vel non* of the magazines was not properly preserved for federal habeas corpus review. This Court should therefore reverse that holding and either decide the obscenity question or remit the case to the District Court with directions to decide the issue on the merits.

* As heretofore noted, the petitioner raised the obscenity issued at the Appellate Division. The District Attorney responded fully on the merits noting only as a brief alternative argument that the issue had been waived (District Attorney's Brief at the Appellate Division at 37-43).

In the alternative, should the Court be unable to conclude on this record that the issue was preserved, it should remit the case to the District Court with directions that an inquiry be made into the understanding with which the plea herein was entered. Cf. *Blackledge v. Allison*, 431 U.S. 63 (1977).

POINT II

AS A MATTER OF CONSTITUTIONAL LAW, THE MAGAZINES UPON WHICH THE PETITIONER'S CONVICTION WAS BASED ARE NOT OBSCENE

The issue having been properly preserved for federal habeas corpus review, (see Point I, *supra*), the petitioner respectfully submits that the magazines upon which his conviction is based are not obscene under the criteria controlling at the time of the conduct charged, and that this Court can and should so hold as a matter of constitutional law. *Jenkins v. Georgia*, 418 U.S. 153 (1974); *United States v. A Motion Picture Film Entitled "I Am Curious-Yellow,"* 404 F. 2d 196 (2nd Cir. 1968).

At the time of the acts here charged, material could be held obscene only if it were found to be "utterly without redeeming social value." See, Penal Law § 235.00(1) (repealed L. 1974, c. 989). This was part of the so-called *Roth-Memoirs* formulation which was so strictly construed that the Supreme Court, employing it, ruled erroneous a state court holding that "a book need not be 'unqualifiedly worthless before it can be deemed obscene' . . ." See *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966). Indeed, when the Supreme Court finally abandoned the test, it noted that proving material to be "utterly without redeeming social value" imposed upon the prosecution "a burden virtually impossible to discharge under our

criminal standards of proof." *Miller v. California*, 413 U.S. 15, 22 (1973). It is this test by which the magazines here in question must be judged. See, e.g., *Marks v. United States*, 430 U.S. 188 (1977).

The magazine underlying the petitioner's felony conviction is entitled, *The Art of Cunnilingus*. Concededly, it contains explicit photographs depicting and suggesting sexual acts, particularly cunnilingus. However, accompanying the photographs, and relating to them, is textual material which defines the acts portrayed, speaks of their utility to those for whom more conventional sexual modes present problems, and attempts to dispel as meaningless the taboos which, in some quarters, are still attached to oral sex. Thereafter, for those inclined to engage in the practice, the text describes five separate positions for doing so. In essence, then, the magazine is an instructive manual explaining the techniques generally used in a now widely indulged in sexual practice.

The usefulness and social value of such a manual for those seeking to enhance, expand or experiment with an aspect of their intimate and private relationships simply cannot be gainsaid. Indeed, another manual entitled, *The Joy of Sex, A Gourmet Guide to Love Making** has been a national best seller for over 140 weeks. That publication contains many explicit drawings of sexual acts with an accompanying instructive text describing a variety of unconventional techniques including forms of oral sex. To the petitioner's knowledge, *The Joy of Sex* has never been found obscene in any court even under the new, more prohibitive, *Miller* standards. The petitioner respectfully submits therefore that, whatever else it might be, *The Art of Cunnilingus* is not "utterly without redeeming social value" and hence it cannot support the instant felony conviction.

*Simon and Schuster, 1972.

The petitioner's misdemeanor conviction rests upon his sale of a magazine entitled, *Young Boys and Oral Sex*. When viewed from the prospective of the large and increasingly vocal homosexual community for which the magazine obviously holds the greatest interest, its text, describing techniques of fellatio and the experiences of individuals with respect thereto, and providing commentary on various studies of homosexuality with a related bibliography, gives the work some social value—more is simply not required. See, e.g., *United States v. Thevis*, 484 F. 2d 1149 (5th Cir. 1974) *reh. denied* 406 F. 2d 1403, *cert. denied* 418 U.S. 932; Compare, *People v. G.I. Distributors*, 20 N.Y. 2d 104, 228 N.E. 2d 787, 281 N.Y.S. 2d 795 (1967).

Since the magazines in question are not "utterly without redeeming social value," they were protected by the First Amendment. Hence, the petitioner's conviction for their sale violates the constitution and must be set aside.

POINT III

THE STATUTE UNDER WHICH THE PETITIONER STANDS CONVICTED, ON ITS FACE AND AS CONSTRUED PRIOR TO THE COMMISSION OF THE ACTS CHARGED, WAS UNCONSTITUTIONAL IN THAT IT DID NOT COMPORT WITH THE SPECIFICITY REQUIREMENT LATER ANNOUNCED IN *MILLER* AND IT FAILED TO GIVE ADEQUATE NOTICE THAT THE MATTER CONTAINED IN THE MAGAZINES IN QUESTION WAS PROSCRIBED.

As heretofore noted, New York's obscenity statute in effect at the time of the commission of the acts here charged was modeled upon the Supreme Court's *Roth-Memoirs* criteria. The provision read:

Any material or performance is "obscene" if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters and (c) it is utterly without redeeming social value. Penal Law Sec. 235.00 (1) (repealed L. 1974, C989) (McKinney's 1967).

On June 21, 1973, however, the Supreme Court decided the case of *Miller v. California*, 413 U.S. 15, wherein it rejected and abandoned the *Roth-Memoirs* test and formulated a new one. The test for obscenity was now held to be "(a) whether 'the average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest

... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." (*Id* at 24.)

By abandoning the "utterly without redeeming social value" test, the Court relieved prosecutors of "a burden virtually impossible to discharge." (*Id* at 22.) However, the new standards also afforded "a safeguard not provided by the *Roth-Memoirs* test . . . [namely] the requirement that applicable law specifically define that sexual conduct whose description is proscribed." *United States v. Palladino*, 490 F. 2d 499, 501 (1st Cir. 1974). On the question of specificity, the Supreme Court saw fit to offer "a few plain examples of what a state statute could define for regulation" under the new standard:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions and lewd exhibition of the genitals.

Miller, supra, at 25.

The Court did not call for a general revamping of state laws but instead noted that "existing state statutes, as construed heretofore or hereafter, may well be adequate." (*Id* at 24 n. 6.)

Following the *Miller* decision, the Court vacated numerous state convictions and remanded the cases to the state courts for reconsideration in light of the new standards. As a result of these remands, and by reason of matters still in the state appellate process when *Miller* was decided, state courts began facing cases which required the application of *Miller* specificity standards to pre-*Miller*

acts purportedly made criminal by pre-*Miller* statutes.

Some courts simply reversed convictions and refused to construe facially indefinite statutes, holding that that was more properly a legislative function. See, e.g., *Commonwealth v. Horton*, 310 N.E. 2d 316 (Mass. Sup. Jud. Ct. 1974); *State v. Shreveport News Agency*, 287 So. 2d 464 (La. Sup. Ct. 1973). Others agreed to construe such statutes but persuasively reasoned that to apply a new statutory construction to acts which preceeded it would be to violate the policy underlying the constitutional proscription against *ex post facto* laws. As one such court observed,

The adoption of authoritative construction could only be prospective as to this appellant for surely a retrospective application of *Miller* would impose upon this appellant an *ex post facto* rule of law, for how can it be said that the defendant's actions in showing the movie were criminal when the alleged crime was committed a year and a half before the statute was revitalized by authoritative construction.

A.B.C. Interstate Theatres, Inc. v. State, 325 So. 2d 123, 126 (Miss. Sup. Ct. 1976)

See, also, *People v. Bloss*, 228 N.W. 2d 384 (Mich. Sup. Ct. 1975); *State v. DeSantis*, 323 A. 2d 489 (N.J. Sup. Ct. 1974); *State v. Harding*, 320 A. 2d 646 (N.H. Sup. Ct. 1974); *State v. Welke*, 216 N.W. 2d 641 (Minn. Sup. St. 1974); *Gibbs v. State*, 504 S.W. 2d 719 (Ark. Sup. Ct. 1974); *Rhodes v. State*, 283 So. 2d 351 (Fla. Sup. Ct. 1973).

New York's obscenity law came before the Supreme Court only a few days after *Miller* was decided. The Court vacated a New York obscenity conviction obtained under the statute and sent the case back to the Court of Appeals for reconsideration in light of *Miller*. *Heller v. New York*,

413 U.S. 483 (1973). Upon reconsideration, the Court of Appeals, by a bare majority, affirmed the conviction and upheld the statute. *People v. Heller*, 33 N.Y.2d 314, 307 N.E. 2d 805, 352 N.Y.S.2d 601 (1973).

All members of the court apparently agreed that the statute as drafted "without more, [did] not on its face meet the Supreme Court test for specificity of sexual conduct." 33 NY 2d at 335 (Jones, J. dissenting). The majority, however, seizing upon the high court's comment that existing statutes "as construed heretofore or hereafter" might pass constitutional muster, framed the question presented as "whether our statute can be construed so as to effectuate the Miller requirements" *Id.* at 326. The court answered the question in the affirmative and went on to construe the statute, producing what one judge of this Court has termed a "rather remarkable piece of judicial legislation." *DeSalvo v. Codd*, 386 F. Supp. 1293, 1301 (S.D.N.Y. 1974) (Oakes C.J. dissenting).

The *Heller* majority recognized that "the terms 'sex' and 'nudity' [appearing in the statute] are not inherently pornographic and would not necessarily be pornographically dealt with, even if exploited commercially." (*Id.* 328.) However, the court, analyzing a number of its previous decisions, concluded that those terms had been limited in the past to "offensive depictions of ultimate sexual acts, masturbation, excretory functions, lewd genital exhibition, i.e. exactly the sort of thing described in the *Miller* opinion. . . ." (*Id.*)

Moreover, the majority insisted that since 1961 the court had consistently applied a constitutionally adequate "hard core pornography" test. That test, first announced in *People v. Richmond County News*, (9 NY 2d 578, 175 N.E. 2d 681, 216 N.Y.S. 2d 369 [1961]) was formulated as follows:

. . . the test of the obscene, of the pornographic is not in the tendency or appeal of the material, but

rather in its content objectively appraised. . . . It focuses predominantly upon what is sexually morbid, grossly perverse and bizarre. . . . Recognizable "by the insult it offers, invariably, to sex, and to the human spirit" . . . it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness. *Id.* at 587.

The District Court below accepted the view of the *Heller* majority that New York's statute had always been construed so as to comply with *Miller* requirements. The petitioner respectfully submits that the *Heller* majority's conclusion was unsupported and incorrect, and that, therefore, the decision of the District Court, which adopted it, was likewise erroneous.

Where a state criminal defendant contends that his constitutional right to fair notice has been violated by a subsequent and unforeseeable statutory construction, the federal courts may examine that construction to determine whether it has support in prior state law. See, e.g., *Ward v. Illinois*, ___ U.S. ___, 97 S.Ct. 2085 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964). The petitioner invites this Court to look behind the *Heller* majority's opinion and to judge whether its assessment of the cases upon which it relied was correct.

On the issue of specificity, *Heller* cited but five cases to demonstrate that the obscenity statute had been construed with requisite specificity. See, 33 NY 2d at 327. We address them *seriatim*: *People v. Kirkpatrick*, (32 N.Y. 2d 17, 295 N.E. 2d 753, 343 N.Y.S. 2d 70 [1973]) dealt primarily with the statutory presumption of scienter, and contained no detailed description of the contents of the magazine. *ZAP*, upon which the conviction there was based. (But, see, 64

Misc. 2d 1055, 316 N.Y.S. 2d 37 [Crim. Ct. 1970] wherein a description of the magazine does appear.) *People v. Richmond County News*, *supra*, held not obscene an issue of the magazine, *Gent*, which contained "[n]umerous pictures and cartoons of nude or semi-nude women and numerous descriptions and depictions of sexual arousal and satisfaction . . ." 9 N.Y. 2d at 587. *People v. Fritch*, (13 N.Y. 2d 119, 192 N.E. 2d 713, 243 N.Y.S. 2d 1 [1963]) held Henry Miller's *Tropic of Cancer* obscene, observing that it contained

. . . nothing more than a compilation of a series of sordid narrations dealing with sex in a manner designed to appeal to the prurient interest. It is devoid of themes or ideas. Throughout its pages can be found a constant repetition of patently offensive words used solely to convey debasing portrayals of natural and unnatural sexual experiences. 13 N.Y. 2d at 124.

Judge Desmond, concurring, added:

From first to last page it is a filthy, cynical, disgusting narrative of sordid amours. Not only is there in it no word or suggestion of the romantic, sentimental, poetic or spiritual aspects of the sex relation, but it is not even bawdy sex or comic sex or sex described with good humor. No glory, no beauty, no stars—just mud. The whole book is "sick sexuality," a deliberate, studied exercise in the depiction of sex relations as debasing, filthy and revolting. *Id.* at 126

But, see, *Grove Press v. Gerstein*, 378 U.S. 577 (1964).

People v. Bookcase, Inc., (14 N.Y. 2d 409, 201 N.E. 2d 14, 252 N.Y.S. 2d 433 [1964]) reversed a conviction for selling material to minors, suggesting that the description: "principally devoted to the subjects of illicit sex or sexual immorality" might very well be too vague to afford adequate notice to potential defendants. 14 NY 2d at 417.

People v. Wendling (258 N.Y. 451, 180 N.E. 169, [1932]) held a play not obscene, notwithstanding its use of coarse and vulgar language. *People v. Stabile*, (58 Misc 2d 905, 296 N.Y.S. 2d 815 [Crim. Ct. 1969]) ruled not obscene magazines which contained "single photographs of females in various poses and stages of nudity, some provocative, prominently displaying the vaginal aperture." 58 Misc. 2d at 906. The conviction in *People v. Carlos*, (24 N.Y. 2d 865, 248 N.E.2d 924, 301 N.Y.S. 2d 46 [1969]) was affirmed without opinion.

It seems clear then that none of the cases upon which the *Heller* majority relied ever specifically defined the conduct whose depiction was proscribed by law. Instead the term "hard-core", which describes the setting and manner in which acts are depicted, was confused with the separate *Miller* requirements that the acts themselves be specifically defined. As Judge Jones wrote for the dissenters in *Heller*:

there are . . . two facets to this branch of the test—(a) hard core and (b) specific definition. It must be evident that hard core (or depiction "in a patently offensive way," in the diction of the Supreme Court . . .) is a characterization which may or may not be applied to many sexual acts. The conclusion that the representation of the act is hard core depends not on the act itself, but on the setting and the way in which the act is done, the overtones, the nuances, the message conveyed.

33 N.Y. 2d at 338

The District Court held below that petitioner had adequate notice that the matter contained in the magazine *Young Boys and Oral Sex* was proscribed, comparing it to the materials held to be obscene in *People v. G.I. Distributors*, (20 N.Y.2d 104, 228 N.E.2d 787, 281 N.Y.S. 2d 795 [1967]). Those materials, however, presented without meaningful text, included photographs portraying

"a young man trying to seize the genitalia of another . . . three nude spanking scenes . . . and several others depicting sadistic assaults." 20 N.Y.2d at 106. The court concluded that "the pamphlet taken as a whole is designed to portray a full range of sexual behavior between young males from byplay to pederasty" *Id* at 106-107. The petitioner respectfully submits that since the scope of activity described in *G.I. Distributors* is far broader than that involved here, that case did not afford adequately specific notice that the matter depicted in the magazine at bar, when presented with the textual material with which it appears, was proscribed.

In *Hamling v. United States*, (418 U.S. 87 [1974]) and in *Ward v. Illinois*, *supra*, the Supreme Court employed an applied test to resolve claims of lack of fair notice. See, e.g. *McKinney v. Parsons*, 513 F.2d 264, 270 (5th Cir 1975), *cert. denied* 423 U.S. 960. In *Hamling*, the Court examined a federal statute which described the material it prohibited with the words "obscene", "lewd", "lascivious", "filthy", "indecent" and "immoral". It was ultimately held that, even under construction made prior to the advent of the *Miller* cases, those terms gave adequate notice to the defendant that he would be in violation of law if he distributed material comprised of, *inter alia*, "a film strip . . . of two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina." 418 U.S. at 93. In *Ward*, *supra*, the Court held that the materials in question "which by title or content may fairly be described as sado-masochistic, had been expressly held to violate the Illinois statute, long before *Miller* and prior to the sales for which *Ward* was prosecuted." —US at —, 97 S. Ct. at 2088. (*Emphasis supplied*.) The nature of the materials here, and the holdings of prior cases decided in this State, provide an apt contrast to both *Hamling* and *Ward*.

Because New York's statute, both on its face and as construed prior to the acts here charged, failed to afford adequate notice that the matter depicted in the magazines in question was proscribed, the statute was unconstitutional as applied to the petitioner. *Cf. Bouie v. City of Columbia, supra*. Therefore his conviction cannot stand and the District Court below erred in refusing to grant him habeas corpus relief.

CONCLUSION

For all of the foregoing reasons, the decision and order from which this appeal is taken should be reversed. A writ of habeas corpus should issue freeing the petitioner from the constraints imposed upon him by reason of the judgment entered in the County Court of New York, Suffolk County. In the alternative, the case should be remitted to the District Court for further proceedings as hereinbefore requested.

Dated: Brooklyn, New York
November 22, 1977

Respectfully submitted,

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ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 29 day of Nov. 1977 deponent served the within Brief upon

Henry F. O'Brien, D.A., Suffolk Co.,

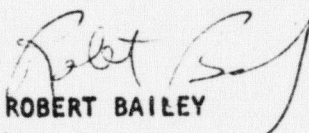
attorney(s) for

Respondents-Appellees

In this action, at

Criminal Courts Bldg., Center Drive So., Riverhead, NY 11901

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 29 day
of Nov. , 1977


WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945

Qualified In Richmond County
Commission Expires March 30, 1978